

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

Vonage Holdings Corp. Petition for
Declaratory Ruling Concerning an Order of
the Minnesota Public Utilities Commission

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WC Docket No. 03-211

**COMMENTS OF
THE PUBLIC UTILITIES COMMISSION OF OHIO**

I. BACKGROUND

On September 22, 2003, Vonage Holdings Corporation (Vonage) filed a petition requesting that the Federal Communications Commission (FCC) preempt an order of the Minnesota Public Utilities Commission (Minnesota Commission) requiring Vonage to comply with state laws governing providers of telephone service. After conducting a proceeding to investigate claims concerning Vonage's services, the Minnesota Commission concluded as follows:

With the Vonage service the customer uses an ordinary touch-tone phone to make calls and carry on conversations. The customer must have an ISP and a computer modem. Although the phone is plugged into an MTA router which, in turn, is plugged into the modem, the consumer is being provided with service that is functionally the same as any other telephone service. Further, the Vonage service intersects with the public switched telephone network.

The Commission finds that what Vonage is offering is two-way communication that is functionally no different than any other telephone service.

Petition, Exhibit 5, at 7.

The Vonage Petition avers that it is a provider of information services and not a telecommunications carrier or common carrier subject to Title II of the Communications Act of 1934. The Vonage Petition asks the FCC to declare certain specific E911 requirements imposed by the Minnesota Commission under state law to be in conflict with federal policies. Further, Vonage states that preemption is necessary because of the impossibility of separating the Internet, or any service offered over it, into intrastate and interstate components. The FCC established a comment cycle prior to addressing the Petition.

II. DISCUSSION

The Public Utilities Commission of Ohio (Ohio Commission) cautions the FCC against accepting Vonage's invitation to rush to judgment by adopting an *ad hoc* approach establishing a regulatory framework for VoIP services. Instead, the FCC should pursue a path of diligence and consistency by undertaking a more holistic examination of the complicated regulatory issues surrounding the recent proliferation of VoIP services. Any conclusions should only be reached after properly framing the myriad of legal and policy issues attendant to the various types of VoIP service

offerings and varied technological configurations. Piecemeal regulation of VoIP could lead to unintended consequences and multiply, rather than diminish, the legal and policy disputes associated with VoIP services.

The FCC and its staff are well known for detailed rulemaking proceedings that comprehensively examine the realm of issues and implications associated with complex technical and jurisdictional matters. Regardless of whether one agrees with the conclusions reached, the deliberate and principled methodology generally utilized by the FCC both in conducting proceedings and in constructing written orders is consistently striking and impressive. Although the time period associated with the pursuit of such a detailed and thorough undertaking is not always welcomed by stakeholders or affected parties, it actually saves time and resources in the long run. As the saying goes: if a job is worth doing, it is worth doing right – the first time.

Departure from those hallmark characteristics in this case would neglect the FCC's duty to meaningfully consider the role of State commissions in regulating communications services (one of the most important Police Powers traditionally exercised by States), as well as the views of all stakeholders concerning those issues. On a more practical level, any sweeping deregulation of certain VoIP services without first comprehensively reviewing the full implications of others could undermine development of local telephone competition and, as such, be a great disservice to

consumers present and future. Moreover, preemption of this scale is simply not a matter to be taken lightly and should be considered only after a thorough and comprehensive examination of all the issues. Otherwise, unintended adverse consequences and increased litigation are likely to occur.

In reality, the issues presented are not as straightforward or as clear-cut as Vonage would have the FCC believe. Vonage describes its own service as “a Voice over Internet Protocol service that permits communication between users of broadband Internet connections” by bridging “the incompatible formats of the Internet and the Public Switched Telephone Network.” Petition at 1. From a consumer perspective, Vonage included a customer testimonial as part of its Petition that described the service as one where “you get a dial tone and would never know you were not using POTS.” Petition, Attachment 1. This customer testimonial goes on to explain how the user of Vonage’s “bypass” service can be used to avoid toll charges and other usage charges. *Id.* Similarly, Vonage’s own website describes its service as “an all-inclusive home phone service that replaces your current phone company.” Petition, Ex. 2, at 14. The jurisdictional implications of such a novel service are not readily resolved by reference to prior FCC decisions.

Likewise, these issues should not be resolved in the various pending cases involving particular VoIP services or technical configurations based on specific facts

presented in those individual cases. *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Docket No. WC-02-361 (filed Oct. 18, 2002); *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications nor a Telecommunications Service*, WC Docket No. 03-45 (filed Feb. 5, 2003). In this regard, Vonage argues that its petition is "not intended to overlap with, or otherwise impact, issues concerning Voice Over IP services being considered by the Commission in other pending proceedings..." Petition at 3. But pursuing each issue separately as it arises is not a prudent approach and could lead to unintended consequences. The FCC should not address these important VoIP issues in an *ad hoc* fashion by merely considering piecemeal claims as they arise.

It is true that, to date, there has not previously been a broad-based examination of VoIP issues by the FCC. Accordingly, the Ohio Commission recommends that, if the FCC is going to coherently address the issues raised in the assorted VoIP petitions currently pending, it should do so in a comprehensive fashion and in the context of a rulemaking-style proceeding.¹ Conclusions should be reached only *after* careful

¹ The Ohio Commission is not independently requesting that the FCC initiate a docket to consider all these VoIP issues. Rather, these comments are being provided in the context of addressing the Vonage Petition and based on public statements by the Chairman regarding the FCC's intention of undertaking a singular, comprehensive review of VoIP issues. The Ohio Commission reserves the right to subsequently formulate any position regarding jurisdictional, legal or policy issues that may arise in future FCC proceedings, in its own proceedings or in proceedings before any Court.

consideration of all the issues and opportunity for stakeholders to thoroughly address the issues.

The Vonage Petition, by contrast, relies heavily on FCC decisions that predate development of the Internet, let alone the development of VoIP services, in claiming that the pertinent issues have already been addressed. It cannot reasonably be asserted that the *Computer I* and *Computer II* decisions resolve the novel and complex jurisdictional questions presented by the recent proliferation of various brands of VoIP services. The Ohio Commission respectfully submits that it would be unwise for the FCC to address the Vonage Petition in a vacuum by deciding VoIP jurisdictional issues in a piecemeal or *ad hoc* fashion. That would not achieve an FCC-caliber result, but would instead amount to regulation by accident.

Earlier this year, the Ohio Commission opened a generic investigation of its own to examine similar issues. *In the Matter of the Commission's Investigation Into Voice Services Using Internet Protocol*, Case No. 03-950-TP-COI. Among other things, the Ohio Commission sought information regarding the various types of service offerings and technical configurations for several specified categories:

- (a) VoIP services carried over the PSTN;
- (b) VoIP services delivered using a combination of private network facilities and the PSTN;
- (c) VoIP services utilizing the Internet;
- (d) VoIP services utilizing commercial mobile radio service facilities;
- (e) VoIP services utilizing other facilities such as cable networks; and

(f) VoIP services utilizing a combination of the above categories.

Ohio Commission Entry (April 17, 2003). Thus, the Ohio Commission has not completed its own investigation and is not presently advocating a specific conclusion or result as to the jurisdictional classification of the various VoIP service platforms. But the Ohio Commission does wish to preserve the vitality of its investigation and the ability to provide further input and recommendations if the FCC does undertake a comprehensive examination of the complex legal, technical and policy issues associated with the recent proliferation of VoIP services.

CONCLUSION

The PUCO urges the FCC to deny the Vonage Petition and indicate that any preemptive conclusions or declarations concerning VoIP have not yet been determined by the FCC and will be addressed, if at all, in a future rulemaking proceeding. If the FCC is considering preemption in this case, it should narrowly prescribe the circumstances presented and more specifically define the issue, then seek a round of comments that would address that particular issue. As another alternative, the FCC could simply hold the Vonage Petition in abeyance pending the outcome of a generic investigation into VoIP issues.

Respectfully submitted,

**ON BEHALF OF THE PUBLIC UTILITIES
COMMISSION OF OHIO**

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